IN THE COUNTY COURT OF VICTORIA
AT GEELONG
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case No. CR-22-00439

DIRECTOR OF PUBLIC PROSECUTIONS

v

ACE JAMIE SMITH

JUDGE:	HIS HONOUR JUDGE WRAIGHT
WHERE HELD:	Plea (Melbourne & Geelong)
	Sentence (Geelong)
DATE OF HEARING:	30 November 2022 & 27 January 2023
DATE OF SENTENCE:	27 January 2023
CASE MAY BE CITED AS:	DPP v Smith
MEDIUM NEUTRAL CITATION:	[2022] VCC 53

REASONS FOR SENTENCE

Subject:	CRIMINAL LAW – Sentencing.
Catchwords:	Plea of guilty – Threat to destroy property – Make threat to kill – Damage property – Obtain financial advantage by deception – Intentionally causing a bushfire – *Bugmy* principles enlivened – Intellectual disability – Significant drug addiction in the context of early depravation – Serious violent offender – Aboriginal offender - COVID-19 pandemic.
Legislation Cited:	*Crimes Act 1958* ss 20, 82(1), 197, 198, 201A(1); *Sentencing Act 1991* ss 6AAA, 6B, 6D, 6E, 18, 44.
Cases Cited:	*Stanger v The Queen* [2021] VSCA 25; *Worboyes v The Queen* [2021] VSCA 169; *Bugmy v The Queen* (2013) 249 CLR 571; *Director of Public Prosecutions v Herrmann* [2021] VSCA 160; *The Queen v McKee* [2003] VSCA 16.
Sentence:	Imprisonment for a period of 15 months and following the period of imprisonment to be placed on a 3 year community correction order.

APPEARANCES:	Counsel	Solicitors
For the Director of Public Prosecutions	Ms A. Dearman	Office of Public Prosecutions

For the Accused	Ms J. Buxton	SLKQ Lawyers

HIS HONOUR:

Introduction

1 Ace Jamie Smith, you have pleaded guilty to:

- one charge of threat to destroy property contrary to s 198 of the *Crimes Act 1958* ('*Crimes Act*'), which carries a maximum penalty of 5 years imprisonment (Charge 1);
- one charge of make threat to kill contrary to s 20 of the *Crimes Act*, which carries a maximum penalty of 10 years imprisonment (Charge 2);
- one charge of damage property contrary to s 197 of the *Crimes Act*, which carries a maximum penalty of 10 years imprisonment (Charge 3);
- one charge of obtain financial advantage by deception contrary to s 82(1) of the *Crimes Act*, which carries a maximum penalty of 10 years imprisonment (Charge 4); and
- one charge of intentionally causing bushfire contrary to s 201A(1) of the *Crimes Act*, which carries a maximum penalty of 15 years imprisonment (Charge 5).

2 You have also admitted your criminal record.

3 **Circumstances of the offending**

4 A prosecution opening was tendered on the plea and may be summarised as follows:

5 You were born in 1990 and you are 31 years old. Your partner is Teesha Hood, who was born in 1994. You and Ms Hood have known each other for eight years and have been in an intermittent relationship for approximately 18 months. You have one child together, who at the time of this offending was five months old.

Graeme and Caroline Cooper are Ms Hood's grandparents, and they reside at a property in Billingham Road, Deer Park.

6 The offending occurred on 28 December 2021 at this property in Deer Park, and surrounds. Your relationship with Ms Hood had broken down and you were not in a relationship at the time of the offending.

7 From 5:11pm on 28 December 2021, you and Ms Hood were engaged in a Facebook message conversation and several phone calls.

8 You sent multiple threatening messages throughout the thread of conversation stating:

a. *'I'm coming their';*

b. *'I'm burning the car';*

c. *'I'm petrol bombing the house';*

d. *'watch what gonna happen dog';*

e. *'pick up or I'm petrol bombing your nan and pop';* and

f. *'word I'm burning the car'.*

9 At approximately 7:53pm you sent *'I'm catching a taxi now'.* At 8:04pm you sent a further message, *'taxi here now'* followed by *'I'm on my way'. 'I'm going to smash the car' 'I'm going to smash ya pop car to'.* At approximately 8:15pm Ms Hood received a further message stating, *'he's left'.* **(Charge 1- Threat to Destroy Property - Rolled Up Charge).**

10 At approximately 8:14pm you were picked up by a West Suburban Taxi driven by Amjad Ali and stated that the destination was Billingham Road, Deer Park and that you would point out the house.

11 You were wearing khaki green pants with a distressed rip design over the knee, dark coloured polo with small motif on the left chest, black hoodie with writing on the left chest 'Aluvate', sleeve and back. You sat in the rear passenger side seat diagonally opposite the driver. You held a lighter and cigarette in your right hand throughout the trip in the taxi cabin which is visible on the CCTV footage.

12 At approximately 8:30pm, Mr Ali parked his taxi out the front of the address in Billingham Road, Deer Park. You wound down the window and yelled out for Ms Hood.

13 Corrine Berry, a resident along Billingham Road, was in her backyard at the time and heard a deep male voice calling out what she believed was 'Aleesha' repeatedly for several minutes.

14 Graham Cooper was home with his wife, his granddaughter, Ms Hood and great-grandson, which is yours and Ms Hood's son. Mr Cooper saw you in a taxi at the front of the premises and went outside.

15 You got out of the taxi screaming, *'tell that bitch I want my fucking phone the cunt'.* Mr Cooper told you to *'fuck off*'. You responded, *'Fuck you and your family. I'll kill the lot of yas'.* Mr Cooper responded, *'your son is in here*'. You replied, *'I don't give a fuck whose in there*'. (**Charge 2- Make Threat to Kill**).

16 Ms Hood came out of the house with a 'bundee' (Aboriginal term for weapon) in her hand and told you to '*fuck off*'.

17 You picked up a brick and threw it at the garage roller door of a neighbouring property, having just missed Ms Hood. The garage door was damaged and had a dent in it. (**Charge 3 – Damage Property**).

18 You got back in the taxi and Mr Ali drove from the address. Mr Ali was concerned for his safety and wanted to prevent any damage to his vehicle. You leant out of

the rear passenger window gesturing to Ms Hood before the taxi stopped and you exited the vehicle.

19 At approximately 8:33pm you got back into the taxi with Mr Ali driving a short distance where you argued with him about paying for the fare of $33.56. You got out of the vehicle without paying. **(Charge 4- Obtain Financial Advantage by Deception).** Mr Ali followed you but returned to the vehicle at 8:35pm then left the area at 8:37pm.

20 You walked off in the direction of Davitt Reserve and lit the first fire at the southern end of the footbridge. You then walked approximately 160 meters into the reserve and lit another fire. (**Charge 5: Intentionally Cause a Bushfire - Rolled Up Charge)**.

21 Davitt Drive Reserve is bordered by Davitt Drive on the western side and Millbank Drive on the Eastern side. Kororoit Creek is approximately south-north through the eastern half of the Reserve before turning west across the northern end. In the western half there is a cleared oval with a playground at the northern end and a fenced dog park at the southern end. A network of paths extend through the Reserve, with a single path/bridge crossing the creek at the northern end; the path continued north to the southern end of Billingham Road. Both fires were approximately 50 metres from residential properties. The approximate square footage is 23,770 metres squared.

22 Mr Cooper went back inside the house to check on his wife and great-grandson when he heard Ms Hood scream about a fire and exclaim, '*What the fuck*'. Mr Cooper went outside to see smoke and Ms Hood stated that she had called triple zero.

23 At approximately 8:39pm Ms Berry observed flames approximately one metre high near the bridge of the reserve and smoke. She heard the crackling of trees and other vegetation as it caught alight.

24 Ms Berry called triple zero and requested the fire brigade and walked to the front of her property. Ms Berry was concerned, as the fire had doubled and the reserve is often busy with children, cyclists, and families walking their dogs at that time of the evening. She took photos of the fire on her phone.

25 At approximately 8:46pm the fire brigade arrived. The fire was contained by 9:04pm.

26 Ms Berry observed Ms Hood and Mr Cooper walk down Billingham Road towards Davitt Reserve. Ms Berry had a conversation with them where they apologised, stating, '*he's meant to stay away*'.

27 At approximately 8:59pm, Ms Hood received a message from a Pay Phone number located at 811 Western Highway, Deer Park, stating, *'YA CAR NEXT'*. At approximately 9:00pm police members arrived on the scene. You had already left.

28 From 10:09pm to the following day, Ms Hood received messages and calls from you via your Facebook account. Further messages via Facebook went from stating you loved her to threatening her, '*pick up or I'm burning all of the cars' 'I'll kill you'* and *'your nan and pops place still going to be burned down still'.* **(Charge 1- Threat to Destroy Property - Rolled Up Charge)**.

29 On 21 December 2021 at approximately 4:20am you were arrested in Maidstone. You were transported to the Werribee police station and you were deemed unfit for interview by a Forensic Medical Officer.

30 **Nature and gravity of the offending**

31 Charge 5 on the indictment, intentionally causing a bushfire, is the most serious offence on the indictment. It is an inherently serious offence which is reflected in the maximum penalty of 15 years' imprisonment. As the Court of Appeal noted in *Stanger v The Queen:*[1]

[1] [2021] VSCA 25, [58].

32 '…[T]he starting point is that the offending was, by its nature, serious. The prescribed maximum sentence for the offence is 15 years' imprisonment. The offence involved the appellant intentionally causing a fire, and in doing so being reckless as to the spread of that fire to vegetation on property belonging to another. The maximum sentence reflects the serious potential impact of the offending of that nature. In Victoria, as in many places of Australia, the high level of danger associated with bushfires has been tragically demonstrated in recent years. Any person living in this State could only be all too familiar with the severe devastation caused by bushfires in the course of the summer. A person who deliberately lights such a fire, being reckless as to the spread of that fire to vegetation on property belonging to another, must be well aware of the potential nature and extent of the harm which can ensue from such conduct'.

33 Ms Buxton, who appeared on your behalf, submitted that the lighting of the fire was not planned or sophisticated, that it did not occur during a period of extreme fire danger and that the fire caused limited damage. However, you lit a fire in two places, 160 metres apart which is why Charge 5 is particularised as a rolled up charge. Thus in my view while the lighting of the fires was spontaneous conduct stemming from your anger while in a drug fuelled state, there was a degree of forethought.

34 Having viewed the photographs of the fire and the aftermath, it is clear that the fire could have caused much more significant damage if it was not extinguished in a timely manner. The area is a bush/park setting containing a number of mature native trees and the fire was also lit adjacent to a pedestrian bridge. In my view this was clearly an intentional act by you born out of anger and frustration and you had no regard to the potential consequences.

35 The offending that gives rise to the other charges on the indictment is also disturbing and serious. On your own admission you were significantly affected by

methylamphetamine at the time of the offending and in the opinion of psychologist, Dr Aaron Cunningham, whose report was tendered on the plea, your drug abuse was the main contributor to your offending behaviour. You have also admitted that you have an anger problem.

36 The threats you made to your partner and her father were clearly frightening and you also demonstrated your anger by damaging property of the victims. This is, in simple terms, family violence of a serious nature. While your drug affected state contributed to your offending, Dr Cunningham notes that you understood the risk that your drug use posed for your offending behaviour.

37 **Personal circumstances**

38 You are 32 years old and you are an Aboriginal man born in Queensland. Your family relocated to Victoria when you were an infant. Your parents separated when you were around four or five years old and you lived with your father. You report having had a positive relationship with your father, and that you had fortnightly contact with your mother while in his care. When you were 10 years old, your father died of a heart attack while being questioned by police. After this, you then lived with your mother and her new partner, and you lost contact with your paternal half-brother and half-sister. You recall witnessing frequent family violence between your mother and step-father. You were also exposed to drug use growing up, as your mother was a methylamphetamine user.

39 You left your mother's home when you were 14 or 15 as a result of the family violence, and you then lived with a cousin in Shepparton until you were 20 years old. This was followed by a period of couch surfing. Around 2012 you entered your first relationship. An intervention order was eventually taken out against you by your partner after you committed family violence against her. Your partner ended this relationship when you were incarcerated in 2014.

40 Around August 2020 you commenced your second significant relationship with the victim in this matter, Teesha Hood. You share an 18-month-old son together. You also have a daughter born to a different mother, with whom you have no contact.

41 You have had regular phone contact with Ms Hood and your son whilst in custody, and report still having the support of Ms Hood's grandparents. The Intervention Order has been varied to allow you this contact via telephone.

42 You were diagnosed with an intellectual disability in primary school and transitioned to a specialist school from Year 7. You describe getting into fights at school, however you were never suspended. You left school at 15, and attempted to gain a vocation as a welder, however you disengaged after two weeks. You were granted the disability support pension at 16 years, and have not sought work since.

43 You have used alcohol and cannabis from about age 13, and methylamphetamine from the age of 18 or 19. You were smoking and injecting around one gram daily. You have used heroin and GHB intermittently, and you are now prescribed 50mg of methadone. You report having previously abused buprenorphine in custody, and although you were prescribed methadone during your four year sentence from 2016, you immediately relapsed after release.

44 A number of reports and letters were tendered in support of you including the psychological report of Dr Aaron Cunningham dated 21 November 2022 and the psychological report of Ms Sandra Cokorilo dated 22 May 2022.

45 Dr Cunningham opines your presentation is consistent with your prior diagnosis of Intellectual Disability, and in line with this diagnosis, you have struggled to maintain stability in education, accommodation, employment and relationships. Dr Cunningham notes that given you were raised in the context of drug use,

violence and criminal behaviour, your intellectual impairment would have made you vulnerable to the modelling of this environment.

46 You told Dr Cunningham that in the lead up to this offending you had an argument with your partner, and you had not slept. You had also used methylamphetamine.

47 As noted above, Dr Cunningham is of the view that your drug abuse was the main contributor to the offending, however that your underlying intellectual disability would have also contributed to your impairments in judgement at the time of the offending. Dr Cunningham assessed you as presenting a moderate risk of future violent offending, which could increase to high, in the context of drug and alcohol abuse.

48 In the report of Ms Cokorilo, she refers to the previous psychological assessment and report of Mr David Ball from 2016, where he confirmed your Intellectual Disability as well as Cannabis Use Disorder and Stimulant Use Disorder. Ms Cokorilo confirms those diagnoses and further diagnoses you with Generalised Anxiety Disorder, Opioid Use Disorder, Sedative, Hypnotic or Anxiolytic Use Disorder and Borderline Personality Disorder.

49 In Ms Cokorilo's opinion, your early environment and disrupted parental attachment are inferred to have led to development of Borderline Personality Disorder. Dr Cunningham however is of the opinion that you do not meet the full DSM-5 criteria for the diagnosis of Borderline Personality Disorder.

50 You instructed Ms Cokorilo that you had thought about death or hurting yourself for several days over the previous two weeks at the time of her report.

51 Both Dr Cunningham and Ms Cokorilo acknowledge your desire to engage in drug and alcohol rehabilitation, and that you have identified your young son as a significant motivation to reform your lifestyle. Dr Cunningham opines you present with insight into the wrongfulness of your behaviour.

52 You come before the court with an extensive criminal history, commencing when you were 18 years old. Whilst you have no prior criminal charges related to fire-lighting or arson, you do have priors for family violence, make threat to kill and damage property charges. You have spent in the order of five years of your adult life in prison.

53 You have an NDIS support plan, and significant support from the Aboriginal community, including your partner's grandfather, Respected Elder, Uncle Graham 'Boots' Cooper and Trevor Barker, Aboriginal support coordinator at Gallawah, a registered NDIS provider. It is clear on the material submitted that this support will continue upon your release.

54 Two letters were prepared by Mr Barker, who writes that you have indicated that your primary goals are to restore family relationships, connect with culture and live safely in the community. Mr Barker has discussed rehabilitation options with you, including the Wulgunggo Ngalu Learning Place. Upon release, Mr Barker indicates that he would work intensively with you to review your plan and ensure that it reflects your disability support needs to help you achieve your goals.

55 You have participated in the Torch program and sold artwork through them. You have indicated your desire to continue with your art, which Mr Barker writes can be continued at Wulgunggo Ngalu.

56 Mr Barker gave evidence on the plea. He confirmed your desire to eventually be accepted into the Wulgunggo Ngalu program. However as the program is administered through Corrections Victoria, it can only be an option as part of a Community Correction Order and you will need to be free of methadone before you can enter the program which you are currently still prescribed.

57 A letter of support has been prepared by Uncle Graham 'Boots' Cooper, who is a respected Yorta Yorta and Kirrip Elder. Uncle Cooper is the victim of Charge 2 and now part of your family constellation through your child. Uncle Cooper writes

that you have been offered to be linked in with Kirrip Aboriginal Cooperation, a cultural safe place for cultural connection and support. Kirrip Aboriginal Cooperation offers a fortnightly Yarning Circle, and also Drug and Alcohol Counselling every week. This counselling includes assessment, screening, treatment, and planning.

58 Ms Lana Nguyen, the manager of Forensic AOD Services at Port Phillip Prison, also prepared a letter confirming that you completed an AOD assessment on 18 October 2022, and you are on a waitlist for a program.

59 You were assessed as suitable for a community correction order in June 2022 in relation to Magistrates' Court proceedings. However, while you were found suitable on that occasion, you were ultimately sentenced to a straight term of imprisonment.

60 Following the plea hearing I had you assessed for a community correction order. As you have been diagnosed with an intellectual disability, you were found unsuitable and it was recommended by the writer that you be assessed for a Justice Plan. As such, I ordered a further assessment. That assessment found you suitable for a Justice Plan and as such, the Community Correction Order Assessment Outcome Report was prepared recommending a number of therapeutic conditions including a Justice Plan.

61 **Sentencing considerations**

62 In detailed written and oral submissions, Ms Buxton highlighted a number of relevant sentencing considerations.

63 I first take into account your plea of guilty. The matter proceeded to this court by way of straight hand-up brief and no witnesses have been cross-examined. As such your plea has saved significant court time and expense and therefore has facilitated the course of justice. The plea carries additional weight which must be reflected in a further amelioration in sentence, as the plea was entered in

circumstances where the pandemic has caused a substantial backlog of cases in the criminal justice system.[2]

64 I take into account your personal circumstances, most particularly your very difficult childhood, which includes the death of your father when you were 10 and exposure to family violence, including family drug use. In my view your dysfunctional childhood and adolescence clearly enliven principles in cases such as *Bugmy v The Queen*[3] and *Director of Public Prosecutions v Herrmann*[4]. As such, I accept that the significant childhood depravation you have suffered should be given full weight in the sentencing discretion.

65 In addition to your dysfunctional childhood you have also suffered from an intellectual disability and a significant drug addiction from an early age, both of which played a part in your offending. However, you present with insight, in that you understand that your drug use impacts your decision making and clearly did so in relation to this offending. Ordinarily, drug use in those circumstances cannot be relied on in mitigation, particularly where the person has an appreciation of the influence of drug use on their behaviour, as you do. Further, you have had repeated opportunities in the form of community-fbased dispositions to address your drug problem. Nonetheless, I accept that your drug addiction has stemmed from your early depravation and has continued to influence your conduct in the context of you also suffering from an intellectual disability and in my view, is able to be taken into account to some extent.[5]

66 Turning to your prospects of rehabilitation, Ms Cokorilo assesses your risk of reoffending as high. Mr Cunningham is of the view that based on the test he administered, you present as a moderate risk of future violent offending with the caveat that your risk could increase to high in the context of drug and alcohol abuse. Even so, despite your difficulties, your insight is good and you understand

[2] *Worboyes v The Queen* [2021] VSCA 169 at [39].
[3] (2013) 249 CLR 571.
[4] [2021] VSCA 160.
[5] *The Queen v McKee* [2003] VSCA 16, [21] per Vincent JA.

what you need to do to break the cycle of drug use and crime. Your prospects are clearly dependent on you receiving significant support in the community. You have had a number of positive supports such as Uncle Graham Cooper who will continue to provide mentorship to you. You also have the benefit of the NDIS plan which offers additional cultural support through Trevor Barker, the Aboriginal Coordinator of Supports at Gallawah, who will assist you in finding residential rehabilitation. In my view your prospects at this stage, on the current material, cannot be viewed as positive, however the material also confirms that if you accept and fully embrace the supports offered to you, your prospects will undoubtedly improve dramatically.

67 General and specific deterrence, denunciation of your conduct and protection of the community are all prominent sentencing considerations in the circumstances. Your conduct, which was a display of anger and aggression arising in a family violence context, cannot be tolerated in our community and a clear message must continue to be conveyed.

68 On Charge 2, you fall to be sentenced as a serious violent offender pursuant to s 6B of the *Sentencing Act 1991* (‘*Sentencing Act’).* Section 6D provides that when sentencing you as a serious offender I must have regard to the protection of the community as the principal purpose for which the sentence is imposed. While I do have regard to protection of the community as part of the general discretion, in all the circumstances, I do not propose to impose a disproportionate sentence nor does the prosecution seek such a sentence.

69 Section 6E of the Act provides that, unless otherwise directed by the court, every term of imprisonment imposed on a serious offender must be served cumulatively. In all the circumstances in my view, the sentence does not demand cumulation in the way anticipated by s6E.

70 You have been in custody since 29 December 2021, some 345 days. However, in June 2022 you were sentenced in the Magistrates' Court on other offending and

received an 8 month sentence which expired on 29 August 2022. As such you only have available to you 196 days as declarable presentence detention on this matter. In the circumstances it was submitted on your behalf that the principle of totality must be taken into account and I have done so with reference to the total time you have been in custody. I have also taken into account the fact that the time you have served thus far has been served under the restrictive conditions that are ongoing as a result of the pandemic. This applies also to any future imprisonment the court imposes.

71 Ms Buxton submitted that in the circumstances a combination sentence would be able to meet the relevant sentencing considerations while providing you the opportunity to return to your family and the community support you have upon your release. Ms Dearman, who appeared on behalf of the Director of Public Prosecutions, submitted that in all the circumstances the only available sentence is a term of imprisonment with a non-parole period.

72 As Charge 5 is an offence which falls within s 44(1A) of the *Sentencing Act 1991,* the prison component of a combination sentence on that charge is not limited to 12 months. In my view while your offending is serious, in all the circumstances, a combination sentence pursuant to s 44 of the *Sentencing Act* is able to meet the relevant sentencing considerations in this instance, while giving you a greater opportunity to engage in sustained rehabilitation upon your release under a Justice Plan.

73 **Sentence**

74 Mr Smith, would you please stand.

75 Ace Jamie Smith, on Charge 1, threat to destroy or damage property, you are convicted and sentenced to 4 months imprisonment. On Charge 2, making a threat to kill, you are convicted and sentenced to 8 months imprisonment. On Charge 3, damaging property, and Charge 4, obtaining a financial advantage by

deception, you are convicted and fined $500 on each charge. On Charge 5, intentionally causing a bushfire, you are convicted and sentenced to 15 months imprisonment as the prison component of the combination sentence pursuant to s 44. The sentences on Charges 1 and 2 do not form part of the combination sentence, however it is intended that those sentences will be served concurrently with the sentence on Charge 5.

76 Upon your release from prison you will be placed on a Community Correction Order for a period of 3 years. While all Community Correction Orders are punitive in nature, the focus of the order will be therapeutic. As part of the order you will be subject to a Justice Plan. Further, you will be required to undergo treatment and rehabilitation for drug and alcohol use, mental health and other programs to reduce reoffending. You will also be subject to supervision for the term of the order.

77 Pursuant to s 18 of the *Sentencing Act*, I declare that 196 days be reckoned as the period of imprisonment already served under the sentence I have imposed. That does not include today.

78 Pursuant to s 6AAA of the *Sentencing Act*, I indicate that had you not pleaded guilty, I would have sentenced you to a period of 3 years and 3 months imprisonment with a non-parole period of 2 years.

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